

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Appellee,)	2 CA-CR 2011-0332
)	DEPARTMENT A
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
JUAN PEDRO LEÓN ABREGO,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
)	

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR201000158

Honorable James L. Conlogue, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
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and Nicholas Klingerman

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B R A M M E R, Judge.

¶1 Juan Pedro León Abrego appeals from his conviction and sentence for second-degree murder. He argues the trial court abused its discretion by denying his request for a jury instruction pursuant to *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964), and by instructing the jury regarding evidence of flight or concealment. We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding Abrego's conviction and sentence. See *State v. Bigger*, 227 Ariz. 196, ¶ 2, 254 P.3d 1142, 1145 (App. 2011). On February 8, 2010, two bicyclists found a deceased woman hidden behind a bush on the side of a highway near Tombstone. The woman was identified as Abrego's wife, M.O.

¶3 Abrego agreed to meet with Detective Roger Clark for an interview following the body's discovery. The interview was recorded by an overhead camera and microphone, and Sergeant Ursula Ritchie also audio-taped portions of the interview with a recording device on her belt. During the interview, which was conducted in Spanish, Abrego admitted to killing his wife because she had been having an affair. He drew a map showing where he had stopped his car along the roadway, pulled M.O. out of the vehicle, strangled her, and left her body.

Abrego was charged with one count of first-degree murder. At trial, Abrego stated his confession had been "a lie" and claimed Clark had instructed him on how to draw the map.

After a five-day jury trial, Abrego was convicted of the lesser-included offense of second-degree murder and sentenced to a sixteen-year prison term. This appeal followed.

Discussion

Willits Instruction

¶4 At trial, the state admitted two transcripts of Ritchie’s audio recording, which did not match completely the audio from the videotape because Ritchie occasionally had left the room during the interview. The trial court explained to the jury that the transcript was from Ritchie’s recorder and was “not a transcript of the recorder that’s in the interview room” and that the video and transcript were “essentially two separate pieces of evidence.”

¶5 Abrego argues the trial court erred by denying his request for a *Willits* jury instruction because the state had “failed to accurately and completely tape [his] interrogation.” He contends missing portions of the transcript from the Ritchie recording, including the discussion while he drew the map of the scene, were necessary for the jury to assess Abrego’s credibility and determine whether his admissions were genuine.

¶6 A *Willits* instruction allows the jury to infer that evidence police failed to preserve would have been exculpatory. *State v. Fulminante*, 193 Ariz. 485, ¶ 62, 975 P.2d 75, 93 (1999). The instruction is appropriate when a defendant proves he was prejudiced by the state’s failure to preserve material and reasonably accessible evidence tending to exonerate him. *State v. Rosengren*, 199 Ariz. 112, ¶ 34, 14 P.3d 303, 313 (App. 2000). We review a trial court’s decision to refuse a proffered jury instruction for an abuse of discretion. *State v. Lopez*, 209 Ariz. 58, ¶ 10, 97 P.3d 883, 885 (App. 2004).

¶7 Here, the record shows the state preserved the entire video and audio recording of Abrego’s interview, despite Abrego’s contention the interview “was not

available either in audio format or by complete transcript.” As the trial court noted when ruling on the motion, either party could have obtained a transcript of the videotape. The court proposed this course of action to the parties during trial when it first realized the transcripts of the Ritchie recording were not complete. It suggested the parties could present the jury with the video and the transcript of Ritchie’s recording and “leave it at that” or “try to get a transcript of the video.” Abrego said he was “more comfortable with [the court’s] first suggestion” and agreed to move forward with the existing transcripts and allow the parties “to argue about the accuracies or inaccuracies.” Abrego had the opportunity to request a transcript of the video but elected not to do so, and a party who “causes or initiates an error . . . has no recourse on appeal.” *State v. Lucero*, 223 Ariz. 129, ¶ 17, 220 P.3d 249, 255 (App. 2009).

¶8 Abrego concedes that “in most cases the failure to transcribe an interview would not generate a *Willits* issue.” However, he contends because this videotape was in Spanish and difficult to hear, the state’s failure to “enhance” the video or “make sure what was being said was accurate and clearly recorded” justified a *Willits* instruction.

¶9 Abrego has failed to support his implication that the state’s failure to videotape an audible confession would constitute the failure to preserve evidence under *Willits*. There is no requirement the state record interviews or confessions. *See State v. Newell*, 212 Ariz. 389, n.9, 132 P.3d 833, 842 n.9 (2006) (recommending videotaping of interrogations); *State v. Jones*, 203 Ariz. 1, ¶ 18, 49 P.3d 273, 279 (2002) (better practice to videotape). Abrego does not dispute the state’s contention that Clark could have testified to the contents of the interview even in the absence of its having been recorded.

¶10 Here, the state retained the existing evidence of Abrego’s confession and provided it to Abrego to use as he saw fit at trial. Therefore, the trial court did not err in refusing to provide the jury with a *Willits* instruction. See *Rosengren*, 199 Ariz. 112, ¶ 34, 14 P.3d at 313.

Evidence of Flight or Concealment

¶11 The trial court instructed the jury as follows:

In determining whether the State has proved the defendant guilty beyond a reasonable doubt, you may consider any evidence of the defendant’s running away, hiding, or concealing evidence, together with all the other evidence in the case. Running away, hiding, or concealing evidence after a crime has been committed does not by itself prove guilt.

Abrego argues the court erred by giving this instruction over his objection because the record did not contain any evidence of concealment. We review a court’s decision to provide a particular jury instruction for an abuse of discretion. *State v. Johnson*, 205 Ariz. 413, ¶ 10, 72 P.3d 343, 347 (App. 2003). A party is entitled to a jury instruction only if reasonably supported by the evidence. *Lopez*, 209 Ariz. 58, ¶ 10, 97 P.3d at 885. A flight or concealment instruction is appropriate where the evidence supports an inference the defendant “utilized the element of concealment or attempted concealment.” *State v. Speers*, 209 Ariz. 125, ¶ 28, 98 P.3d 560, 567 (App. 2004), quoting *State v. Smith*, 113 Ariz. 298, 300, 552 P.2d 1192, 1194 (1976).

¶12 Here, sufficient evidence, including Abrego’s confession, existed to support a conclusion that he had killed M.O. and then had attempted to hide her body. Thus, there was sufficient evidence to support a concealment instruction. See *Lopez*, 209 Ariz. 58,

¶ 10, 97 P.3d at 885. The deputy who was dispatched to the scene where M.O. was discovered testified that she had been “hidden behind [a] bush that was along the highway.” Clark testified that Abrego admitted he had “dragged [M.O.]’s body and placed her” where she was found. Additionally, the transcript of Abrego’s interview reveals he said he had strangled her next to their car but then left her “in the tree.” Moreover, Abrego had filed a missing person report with the police department and had contacted the Mexican Consulate, family members, and M.O.’s employer in an apparent attempt to find her. In light of his confession, these actions support an inference that Abrego feigned ignorance of M.O.’s whereabouts to overcome any suspicion he had killed her. *See Speers*, 209 Ariz. 125, ¶ 28, 98 P.3d at 567. Therefore, the trial court did not err by providing the jury a concealment instruction.

Disposition

¶13 For the foregoing reasons, we affirm.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge